



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 7, 2004

Ms. Jennifer Soldano
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2004-2832

Dear Ms. Soldano:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 198853.

The Texas Department of Transportation ("TxDOT") received a request for all records pertaining to any investigation and related sanctions by or for TxDOT regarding bidding crime, fraud, or related conduct by two named businesses. You state that you have released some of the requested information. However, you claim that some of the requested information is excepted from disclosure under sections 552.110 and 552.116 of the Government Code. You submitted two separate sets of documents as responsive to the request. We have considered the exceptions you claim and reviewed the submitted information.¹

In Senate Bill 1581, which became effective on June 18, 2003, the Seventy-eighth Legislature amended section 552.116 of the Government Code. As amended, section 552.116 provides as follows:

¹ We note that you indicate that the information in your first submission to this office is a representative sample. We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency or institution of higher education as defined by Section 61.003, Education Code, a county, or a municipality is excepted from [public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You represent that the information in your first submission to this office relates to an audit authorized by state law, and you state that the submitted information was "compiled during the course of a formal audit being conducted by a TxDOT internal auditor." See Gov't Code §§ 321.0134, 2102.007. Based on your representations, we conclude that the information in your first submission constitutes audit working papers under section 552.116 of the Government Code, and it may be withheld on that basis.

We now turn to your argument under section 552.110 of the Government Code for the information in your second submission to this office. Section 552.110(b) excepts from disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" Gov't Code § 552.110(b). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. See also Open Records Decision No. 661 at 5-6 (1999); *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

TxDOT first asserts that release of the information at issue would cause substantial competitive harm to the third party from whom it was obtained. TxDOT argues that release of "[t]his information would cause substantial competitive harm to the person from whom

it was obtained . . . because it reveals the companies [sic] liabilities and equity. Knowing such financial information gives competitors an advantage in bidding.” Section 552.110(b) excepts information “for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm.” Upon review of TxDOT’s argument we conclude that TxDOT has failed to demonstrate based on specific factual evidence that the third party would be harmed by release of the information.²

Next TxDOT asserts that the information at issue is excepted from disclosure under section 552.110(b) because its release would adversely affect TxDOT’s competitive interest in the construction market. Section 552.110(b) excepts from disclosure “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to *the person from whom the information was obtained*[.]” Gov’t Code § 552.110(b) (emphasis added). Thus, section 552.110(b) is designed to protect third party interests, not the interests of a governmental body. *See* Open Records Decision No. 661 (1991). As explained above, TxDOT has failed to make the requisite demonstration that release of the information would result in substantial competitive harm to the third party. Therefore, we conclude that TxDOT has failed to demonstrate that the information at issue is excepted from disclosure under section 552.110(b).

We note, however, that the information in your second submission to this office contains an account number. Section 552.136 of the Government Code states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. TxDOT must, therefore, withhold the marked bank account number under section 552.136.

In summary, TxDOT may withhold the information in its first submission under section 552.116 of the Government Code. TxDOT must withhold the marked account number in the second submission under section 552.136 of the Government Code. The remaining information must be released to the requestor.

² We further note that TxDOT failed to notify the third party whose information is at issue as provided for in section 552.305 of the Government Code. *See* Gov’t Code § 552.305(d) (“If release of a person’s proprietary information may be subject to exception under Section . . . 552.110 . . . , the governmental body that requests an attorney general decision under Section 552.301 *shall* make a good faith attempt to notify that person of the request for the attorney general decision.”) (emphasis added). Therefore, the third party in this case has had no opportunity to brief this office with arguments explaining how its information is excepted from disclosure.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

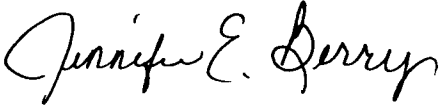
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink that reads "Jennifer E. Berry". The signature is fluid and cursive, with the first name "Jennifer" being more prominent than the last name "Berry".

Jennifer E. Berry
Assistant Attorney General
Open Records Division

JEB/sdk

Ref: ID# 198853

Enc: Submitted documents

c: Ms. Lori Burton
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(w/o enclosures)